No. 91-1639

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHEMICAL MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Environmental Protection Agency's Consolidated Permit Regulations governing the issuance of discharge permits under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, are directly reviewable in the United States Court of Appeals for the District of Columbia Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2198

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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-15) is reported at 673 F. 2d 400.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-16) was entered on March 2, 1982. The petition for a writ of certiorari was filed on May 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 301(a) of the Clean Water Act of 1977, prohibits the discharge of any pollutant in navigable waters except in compliance with federal requirements. 33 U.S.C. 1311(a). To the extent applicable, a discharger must comply

with technology-based effluent limitations and standards of performance prescribed by the Administrator of the United States Environmental Protection Agency under Sections 301 and 306 of the Act, 33 U.S.C. (& Supp. IV) 1311 and 1316. See generally *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). Dischargers must also secure National Pollutant Discharge Elimination System (NPDES) permits, which "transform generally applicable effluent limitations and other standards * * * into the obligations (including a timetable for compliance) of the individual discharger * * *." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). See 33 U.S.C. (& Supp. IV) 1342. NPDES permits are issued by EPA in each state until the state gives satisfactory assurance that it will administer the program in conformance with federal requirements. 33 U.S.C. (& Supp. IV) 1342. After approving state administration of the NPDES permit program, the EPA Administrator may nonetheless disapprove the terms and conditions of individual permits that the state proposes to issue. 33 U.S.C. (& Supp. IV) 1342(d). See *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980).

2. On June 7, 1979, EPA substantially revised the regulations governing the issuance of NPDES permits. 44 Fed. Reg. 32854; see also 43 Fed. Reg. 37077 (1978) (proposed revisions). Lawsuits challenging these new regulations were filed in several district courts and courts of appeals.

On June 14, 1979, EPA proposed to consolidate the permit regulations governing NPDES permits with those governing permits for hazardous waste management facilities under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (& Supp. IV) 6901 *et seq.*, Underground Injection Control (UIC) permits under the Safe Drinking Water Act (SDWA), 42 U.S.C. (& Supp. IV) 300f *et seq.*, and dredged or fill material permits under Section 404 of the Clean Water Act of 1977, 33 U.S.C. (Supp. IV)

1344. See 44 Fed. Reg. 34243 (1979). EPA issued final "Consolidated Permit Regulations" (sometimes referred to herein as "CPRs") on May 19, 1980. 45 Fed. Reg. 33287, codified at 40 C.F.R. Parts 122-125. See generally *Natural Resources Defense Council, Inc.* v. *EPA*, 673 F. 2d 392, 395-396 (D.C. Cir. 1980). Again, interested parties sought review in the district courts and in the courts of appeals.

3. All of the petitions to review the 1979 NPDES regulations and the consolidated permit regulations that had been filed in the courts of appeals were eventually transferred to the United States Court of Appeals for the District of Columbia Circuit. See *NRDC* v. *EPA, supra*, 673 F. 2d at 396; *Virginia Electric & Power Co.* v. *EPA*, 655 F. 2d 534 (4th Cir. 1981). Petitioners then moved to dismiss all of the petitions for review on the ground that the permit regulations were not "effluent limitation[s] or other limitation[s]" within the meaning of Section 509(b)(1)(E) of the Clean Water Act of 1977, 33 U.S.C. 1369(b)(1)(E).

The court of appeals denied the motion to dismiss, reserving judgment on whether any of the challenged regulations was "ripe for review." See Pet. App. A-8 n.13, A-15. The court observed that a superficial reading of Section 509(b)(1)(E) might suggest that only "numerical" effluent limitations were subject to direct review, as petitioners' had argued. See Pet. App. A-5 to A-6. The court found that reading of the statute untenable for two reasons. First, "effluent limitation" is defined in the Act to include (Pet. App. A-5 to A-6) " '*any* restriction' on the amounts of pollutants discharged, not just * * * numerical restriction[s]." Second, assuming that "effluent limitations" only included numerical restrictions, the court noted that Section 509(b)(1)(E) authorizes review of effluent limitations as well as "other limitation[s]." See Pet. App. A-5. Specifically citing (Pet. App. A-9) 40 C.F.R. 122.54, 122.60, and 122.62-122.66, the court explained that some of the consolidated

permit regulations "restrict who may take advantage of certain provisions or otherwise guide the setting of numerical limitations" in NPDES permits. The permit regulations thus contained either "effluent limitation[s] or other limitation[s]" within the meaning of Section 509(b)(1)(E), and the court had jurisdiction to review at least those that were "ripe."[1]

ARGUMENT

1. Petitioners' claims are premature. Of course, as petitioners note (Pet. 8 n.10), this Court has jurisdiction under 28 U.S.C. 1254(1) to review interlocutory decisions of the courts of appeals. See, *e.g.*, *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947). The occasions for the exercise of that jurisdiction, however, should be rare. Indeed, the interlocutory character of a judgment is, without more, sufficient reason for denying a petition for review. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); see *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). The matters that require this Court's attention are far too numerous to permit the luxury of reviewing interlocutory decisions, which may "become quite unimportant by reason of the final result, or of intervening matters" (*American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893)). After final judgment, the interlocutory matters that are still of any consequence may be presented to this Court along

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[1] EPA argued that the court also had jurisdiction to review the consolidated permit regulations under Section 509(b)(1)(D), and pursuant to principles of ancillary jurisdiction. Because the court concluded that Section 509(b)(1)(E) was sufficient to support jurisdiction, it was unnecessary to consider these alternative jurisdictional bases. Pet. App. A-5 n.8.

with any other claims that arise in the course of the proceeding. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, *supra*, 240 U.S. at 257-259.

These concerns apply with particular force in this case for at least two reasons. First, it is not clear that any of the regulations petitioners challenge will ever be reviewed in the court of appeals. The court emphasized that its judgment on the jurisdictional issue implied nothing as to whether any of the consolidated regulations was ripe for review (Pet. App. A-8 n.13): "We hold only that this court has authority under § 509(b)(1)(E) to review any CPR's that are ripe." See also Pet. App. A-15. Second, because of the limited nature of the court of appeals' holding, the jurisdictional issue is necessarily presented to this Court in the abstract and without focus. In effect, this Court is asked to decide the hypothetical question whether the court of appeals would have jurisdiction to review any of the consolidated permit regulations governing NPDES permits, if the court of appeals eventually concludes that any of the regulations petitioners challenge is ripe for its review.[2] Like any other interlocutory

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[2]Many of the challenges to the consolidated permit regulations have already been resolved. See, *e.g.*, 47 Fed. Reg. 4992 (1982) (final regulations implementing settlement of Underground Injection Control issues); 47 Fed. Reg. 15304-15308 (1982) (Regulatory Interpretation Memorandum and Technical Amendments under RCRA Settlement Agreement); Settlement Agreement on NPDES Issues (filed in the court of appeals June 9, 1982). Petitioners and EPA jointly moved to dismiss a number of the challenges to the NPDES regulations on ripeness grounds; the court of appeals agreed that those issues were not ripe, and dismissed them on August 6, 1982. Of petitioners' initial challenges to the NPDES regulations, only a few are still at issue, involving: (1) the breadth of EPA's power to veto permits that the states propose to issue (see 40 C.F.R. 123.75), (2) the failure to provide for modification of best available technology based effluent limitations when available technology does not assure compliance with the limitations (see 40 C.F.R. 122.15), and (3) the retention of authority by EPA to grant certain variances (40 C.F.R. 123.71 and 124.62).

ruling, of course, the court's jurisdictional holding may be rendered academic by its decision on the merits; if not, petitioners can raise their present claims at that time, along with any others they may have.

2. As the court of appeals acknowledged (Pet. App. A-7), there may be some tension between the decision in this case and the holding in *American Iron & Steel Institute (AISI)* v. *EPA*, 543 F. 2d 521 (3d Cir. 1976). For reasons already stated, in its present posture this case is an inappropriate vehicle for resolving any conflict between the two decisions. Moreover, the decisions are not irreconcilable, and, in any event, the court below adopted a reasonable interpretation of the statutory language that is consistent with EPA's current position. Accordingly, even if the decision of the court of appeals were not interlocutory, this case would not warrant review.

In *AISI* v. *EPA*, *supra*, a number of parties sought direct review of EPA regulations governing the circumstances in which effluent limitations or standards for individual NPDES permit applicants could be modified to take into account pollutants in the applicant's water supply. 543 F. 2d at 523 & nn.1 & 2. Deferring to EPA's construction of the statute, the Third Circuit concluded that these regulations were not effluent limitation[s]" within the meaning of Section 509(b)(1)(E). 543 F. 2d at 526-527. Without addressing whether the regulations might be "other limitation[s]" subject to review under Section 509(b)(1)(E) (see 543 F. 2d at 525 n.9), the court dismissed the petitions for review for lack of jurisdiction. It is by no means clear that the Third Circuit would have dismissed the petitions for review if, as in this case, the agency had concluded that the regulations contained effluent limitations. More important, unlike the Third Circuit, the court below considered both aspects of Section 509(b)(1)(E) in ruling on the jurisdictional issue, relying on both in concluding that the consolidated permit

regulations contained *either* effluent limitations or other limitations, within the meaning of the statute. Pet. App. A-7 n.11.

Petitioners' primary contention in this Court (Pet. 14-17) is that Section 509(b)(1)(E) of the Act authorizes direct review only of effluent limitations that are expressed in "numerical" terms. That contention is insubstantial. There is no basis in the language of the statute or its history for restricting the scope of the provision in that fashion. Moreover, as the court of appeals explained (Pet. App. A-5 to A-6), "effluent limitation" is defined to include *any* restriction on the discharge of pollutants, however expressed, including, for example, "schedules of compliance," which plainly are not numerical limitations. 33 U.S.C. 1362(11); see *NRDC* v. *EPA*, 656 F. 2d 768, 775 (D.C. Cir. 1981). Furthermore, petitioners' construction of the statute largely ignores the phrase "other limitations," which is manifestly broad enough to include restrictions on the discharge of pollutants that are not expressed in numerical terms. See *Virginia Electric & Power Co.* v. *Costle*, 566 F. 2d 446 (4th Cir. 1977). Finding no support in the language or history of the provision at issue in this case, petitioners cite (Pet. 16 n.20) a number of other provisions in the Clean Water Act, which assertedly use the phrase "effluent limitation or other limitation" to refer only to numerical restrictions.[3] Petitioners place (Pet. 17) particular, though unwarranted,

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[3]It is unnecessary to pause to consider each of the cited provisions since they shed little light on Congress' intention in authorizing direct appellate review of "effluent limitation[s] or other limitation[s]" in Section 509(b)(1)(E). For example, petitioners cite Section 510 of the Act, which prohibits the states from adopting any "effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance" that is less stringent than those prescribed by EPA. It is far from obvious, and petitioners offer no reason for concluding, that this provision is only applicable if both EPA and the state express the restrictions in "numerical" terms.

weight on a passage from S. Rep. No. 92-414, 92d Cong., 1st Sess. 81 (1971), indicating that "clear and identifiable requirements" would "provide manageable and precise benchmarks" in citizen enforcement suits under Section 505 of the Act, 33 U.S.C. 1365. Non-numerical restrictions may be clear, identifiable, manageable, and precise.

Among other things, the consolidated permit regulations prescribe terms and conditions applicable to all NPDES permits. For example, 40 C.F.R. 122.60(g) restricts the intentional diversion of waste streams from any portion of a treatment facility. Under 40 C.F.R. 122.60(h), noncompliance with technology based effluent limitations is excused if the noncompliance was the result of an "exceptional incident" involving "factors beyond the reasonable control of the permittee." Similarly, 40 C.F.R. Part 125 prescribes the requirements for securing variances from Section 301 effluent limitations. With limited exceptions, "all permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of the total metal," including both dissolved and suspended metal (40 C.F.R. 122.63(c)). Other permit regulations flatly bar the issuance of a permit in some circumstances, see 40 C.F.R. 122.52(i), or prohibit the inclusion of certain types of effluent limitations, 40 C.F.R. 122.10(a)(2) and 122.66(d)(4). Each of these provisions regulates the amount, rate, or quantity of pollutants that may be lawfully discharged into the waters of the United States. Compare *NRDC* v. *EPA*, *supra*, 656 F. 2d at 776. Under Section 509(b)(1)(E), therefore, they are reasonably regarded as "effluent limitation[s] or other limitation[s]" subject to direct appellate review. See *NRDC* v. *EPA*, *supra*, 656 F. 2d at 776; *VEPCO* v. *Costle*, *supra*, 566 F. 2d at 446.

To the extent practical consequences and common sense are germane, see *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-197 (1980); *E. I. du Pont de Nemours & Co.*

v. *Train*, 430 U.S. 112, 136-137 (1977), they also support the holding of the court below. As in *E. I. du Pont*, petitioners' "construction would produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § 402 but would have no power of direct review of the basic regulations governing those individual actions" (430 U.S. at 136). "Absent a far clearer expression of congressional intent" (*Crown Simpson Pulp Co.* v. *Costle, supra*, 445 U.S. at 197), the court below sensibly accepted EPA's construction of the statute, which avoids reading such perversity into the judicial review provisions of the Clean Water Act.[4]

There is an additional practical consideration that supports the holding of the court of appeals on the facts of this case. The consolidated regulations govern permit programs under the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), and both the dredged or fill material permit program and the NPDES program under the Clean Water Act. Petitioners do not dispute the jurisdiction of the court below to review the non-NPDES aspects of the regulations; indeed, under the RCRA and the SDWA, the court's jurisdiction is exclusive. See Pet. 3 & n.1, 14 & n.18; Pet. App. A-3 n.3; see generally *NRDC* v. *EPA, supra*, 673 F. 2d at 395. While some of the challenges to the regulations may involve issues unique to one or the other of the programs, there is but one administrative record. To us it seems significantly more efficient and sensible to have one court determine in one proceeding all of the issues that are now ripe for review than to have numerous courts all over the country in separate proceedings similtaneously considering the various NPDES aspects

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[4]Petitioners' make much of EPA's prior and contrary construction of the Act (see Pet. 5-6), but the agency's erroneous construction of the statute in the past surely provides no substantial basis for perpetuating the error once it has been discovered and over the agency's objection.

of the regulations while the D.C. Circuit considers the RCRA and SDWA components. Cf. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 615-617 (1966).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Although the court of appeals found it unnecessary to consider any alternative jurisdictional bases, we note that these same practical considerations tend to support the exercise of ancillary jurisdiction. See generally *E. I. du Pont de Nemours & Co.* v. *Train*, *supra*, 430 U.S. at 125 n.14.